



BRB No. 17-0049
Case No. 2015-LDA-00030
OWCP No. 02-233683

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|------------------------------|---|-----------------------------------|
| MARIA JORDAN |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | DATE ISSUED: <u>Nov. 15, 2016</u> |
| DYNCORP INTERNATIONAL, LLC |) | |
| |) | |
| Employer-Respondent |) | |
| |) | |
| and |) | |
| |) | |
| CONTINENTAL CASUALTY COMPANY |) | |
| |) | |
| Carrier-Petitioner |) | ORDER |

On October 12, 2016, the Board received employer/carrier's notice of appeal of the administrative law judge's September 8, 2016 "Order Denying Employer's Motion to Reconsider Order Imposing Discovery and Evidentiary Limits on Claimant until Claimant Complies with Orders of this Court." 33 U.S.C. §921(a); 20 C.F.R. §802.205(a). This appeal is timely by date of mailing, October 6, 2016. 20 C.F.R. §802.221(b). This appeal is assigned the Board's docket number 17-0049. All correspondence regarding this appeal should bear this docket number. 20 C.F.R. §802.210.

In his June 27, 2016, "Order Imposing Discovery and Evidentiary Limits on Claimant until Claimant Complies with Orders of this Court," the administrative law judge enumerated the orders with which claimant has not complied. The administrative law judge declined to certify the facts of claimant's non-compliance to the district court pursuant to Section 27(b), 33 U.S.C. §927(b). However, the administrative law judge sanctioned claimant pursuant to 29 C.F.R. §18.57(b) by limiting the evidence she will be

permitted to introduce at the formal hearing until such time as claimant complies with the discovery orders.

Employer/carrier filed a motion for reconsideration of this order, urging the Section 27(b) sanction as more appropriate to claimant's non-compliance and contending, essentially, that the evidentiary limitations will prejudice employer because claimant will have the benefit of employer's evidence whereas employer will not have the benefit of any of claimant's evidence. The administrative law judge denied employer's motion for reconsideration. He stated that he had considered the Section 27(b) sanction but had determined that lesser sanctions were warranted at this juncture; he observed that additional misconduct could warrant greater sanctions. The administrative law judge denied employer's other contentions because they did not demonstrate: (1) manifest errors of law or fact; (2) the existence of newly discovered or previously unavailable evidence; (3) manifest injustice; or (4) an intervening change in controlling law. Sept. 8, 2016, Order at 5 (citing *McDowell v. Calderon*, 197 F.3d 1253 (9th Cir. 1999), *cert. denied*, 529 U.S. 2000)). This appeal ensued.

We dismiss employer/carrier's appeal. Employer/carrier's appeal is of an interlocutory order of the administrative law judge. As the Board has stated in dismissing the prior interlocutory appeals in this case,¹ employer/carrier's appeal does not present issues which warrant the Board's piecemeal review of the administrative law judge's procedural and discovery orders. *See generally Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014); *Armani v. Global Linguist Solutions*, 46 BRBS 63 (2012). Any party who is aggrieved by the administrative law judge's final Decision and Order awarding or denying benefits to claimant may file an appeal of that decision as well as of the administrative law judge's interlocutory orders. *Newton v. P & O Ports Louisiana, Inc.*, 38 BRBS 23 (2004); *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002).

Specifically, the administrative law judge is afforded wide discretion in issuing rulings on discovery matters, in addressing pre-hearing issues, and in determining the admissibility of evidence. 33 U.S.C. §§923(a), 927(a); *see, e.g., Collins v. Electric Boat Corp.*, 45 BRBS 79 (2011); *Maraney v. Consolidation Coal Co.*, 37 BRBS 97 (2003); *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990); *Durham v. Embassy Dairy*, 19 BRBS 105 (1986). At this juncture, employer/carrier has not been deprived of due process of law as it is entitled to a full pre-deprivation hearing, as well as post-hearing review. *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *see also McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002) (administrative law judge cannot award benefits due to employer's failure to appear at the hearing when no evidence supporting the claim was

¹ The Board has dismissed claimant's ten interlocutory appeals in BRB Nos. 14-0277, 14-0375, 15-0518, 16-0117, 16-0139, 16-0190, 16-0231, 16-0486, 16-0585 and 16-0632. The Board's Order in BRB No. 16-0486 has been appealed to the United States Court of Appeals for the Fifth Circuit, No. 16-60576.

admitted into evidence); *see generally Touro v. Brown & Root Marine Operators*, 43 BRBS 148 (2009); *cf. Niazy v. The Capitol Hilton Hotel*, 19 BRBS 266 (1987) (Board decided interlocutory appeal when a party's right to due process was abridged). Moreover, the Board is not in a position to order the administrative law judge to take any particular action in response to the refusal of claimant and her attorney to abide by the administrative law judge's pre-hearing and discovery orders.² *See A-Z Int'l v. Phillips*, 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999); *Floyd v. Penn Terminals, Inc.*, 37 BRBS 141 (2003).

Accordingly, employer/carrier's interlocutory appeal is dismissed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

² Indeed, in its prior orders, the Board has admonished claimant and her husband/attorney that failure to comply with the orders of the administrative law judge place them at risk of being sanctioned. 33 U.S.C. §927(b). We again urge claimant to comply fully with the administrative law judge's discovery orders and remind claimant that it is she who bears the burden of proving the elements of her claims by a preponderance of the evidence, not employer who bears the burden of disproving them. *McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002).